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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG AMERIKANISCHE PACKETFAHRT AKTIEN GESELLSCHAFT,

Respondent.

The Petition of Louis H. May, Indemnity Insurance Company of North America and Royal Indemnity Company for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement.

Your petitioner, Louis H. May, is the assignee of the owners of certain merchandise which was laden on the German Motorship "Isis", in December, 1927, at various ports on the Pacific Coast of Canada, the United States and Central America, consigned to Hamburg. Your petitioners, Indemnity Insurance Company of North America and Royal Indemnity Company, are the stipulators for libellant's costs against whom a decree for costs was en-

tered in the District Court. Your petitioner, Louis H. May (hereinafter referred to as "the petitioner"), filed five separate libels against the respondent (which were later consolidated under the above title) in the United States District Court for the Southern District of New York. The case was referred to a commissioner and thereafter, on his report, a decree was entered dismissing the libels. Thereafter, your petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the District Court. The opinion of the Circuit Court of Appeals is reported in 63 Fed. (2d) at page 248, and appears in the Record at page 700. The opinion of the United States District Court for the Southern District of New York is reported in 57 Fed. (2d) at page 265, and appears in the Record at page 685.

The Nature of the Case.

The "Isis" was a general ship engaged in the common carriage of merchandise by sea. At the time of sailing from her various loading ports on the Pacific Coast she was seaworthy. While proceeding up the Weser River, on her way to Bremen, Germany, she stranded, owing to negligence in navigation, and sustained certain damage, including a 45° twist in her rudder stock. With the assistance of tugs she proceeded to Bremen, where she was put in drydock. The dock was not entirely pumped out, however, and at the time the vessel was examined (which was at night) the lower part of her rudder was under water. The head office of the respondent at Hamburg dispatched respondent's marine superintendent to Bremen, and he decided, after consultation with the head office of the respondent, that the vessel should proceed to Hamburg without being repaired, with her rudder lashed amidships and with the assistance of three tugs. Under his direction she set

out on the voyage at night, without obtaining any certificate of seaworthiness. After proceeding for some six miles, she took a sheer to starboard which the tugs were unable to control, and again stranded, sustaining damage which made it necessary for her to discharge and transship her cargo, in order to make necessary repairs. When the cargo arrived at destination respondent exacted from the consignees cash deposits to secure the payment of general average contribution to the sacrifices and expenses incurred in connection with both strandings.

Your petitioner does not dispute the liability of the cargo for general average contribution in connection with the first stranding.

Your petitioner contended that the respondent was not entitled to any contribution from cargo in respect of the second stranding, and this proceeding was brought to recover the amount of the deposits exacted to secure the contributions claimed in respect of that stranding. Your petitioner contended that the "Isis", when she left Bremen, was unseaworthy to navigate the narrow and tortuous channel of the Weser River, particularly at night; that her rudder (as well as the rudder stock) was bent, so that even with the rudder lashed amidships her course would be erratic, and she could not make such a voyage safely while being steered by tugs.

The Circuit Court of Appeals held:

(1) That the "Isis" was unseaworthy when she left Bremen.

(2) That the decision to sail the vessel in her crippled condition was made by the owner, through its marine superintendent, and not by the master.

(3) That the unseaworthiness of the vessel did not contribute to the second stranding, which was due to negligent navigation.

(4) That a loss of due diligence and unseaworthiness not contributing to a subsequent loss does not deprive a shipowner of the exemption granted in Section 3 of the Harter Act (Act of February 13th, 1893; U. S. C., Title 46, Sec. 192).

(5) That the respondent was, therefore, entitled to exemption under Section 3 of the Harter Act, and entitled to recover general average under the terms of the "Jason Clause" in the bills of lading, notwithstanding its personal intervention at the intermediate port of Bremen, and its personal responsibility for the condition in which the "Isis" left that port.

We quote as follows from the opinion of the Circuit Court of Appeals:

> "The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence. But the shipowner did intervene at Bremen through its marine superintendent for it was he, rather than the master of the ship, who decided to send the ship out of Bremen under tow. The master was consulted but the marine superintendent made the final decision. If sending the ship forward under tow was an error causing the damage, it would, in any case, be one of management or judgment covered by the exception in the bill of lading" (Record, p. 710).
>
> * * * * * * *
>
> "It was not questioned but what the ship was seaworthy when it left its last loading port. When it broke ground it satisfied all requirements of seaworthiness and due diligence under the terms of the bill of lading" (Record, p. 710).
>
> * * * * * * *
>
> "We have held that while the Harter Act requires an owner to provide a ship that is in all re-

speets seaworthy before he can take advantage of the exemption under the act, this requirement affects only causes of action for damages resulting from unseaworthiness. *Hartford & N. Y. Transp. Co. v. Rogers & Hubbard Co.* (C. C. A.), 47 Fed. (2) 180, 182. There we said:

> "It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness" (Record, p. 712).

* * * * * * *

"Concededly the vessel had her rudder stock twisted and the lower half of the rudder blade was deflected to starboard 5°. She had her rudder secured amidships and was in tow of three tugs, one on a hawser ahead and one tug lashed to either side. The tug ahead had 1050 h. p., those on the sides about 800 each, and while it is true that the bend in the rudder blade was not found below to have occurred at the time of the second stranding, this is based upon the claim that there was no evidence that the rudder struck anything on the port side. But be that as it may, it is not important for the reason that competent navigators testified that a 5° bend would not affect the steering except to a slight extent. Thus we have a vessel proceeding on her voyage from Bremen crippled and assisted. The fault in navigation which resulted in her stranding was the fault of the pilot; not of the master of the vessel. Under these circumstances, the vessel was not seaworthy" (Record, p. 713).

* * * * * * *

"The 'Isis' was fitted for the voyage and it was not intended that she would proceed in stages and when she sailed from Bremen, the owner's warranty of seaworthiness was thereupon performed and discharged. While we have accepted the stages of voy-

age doctrine, we have held that if a vessel is seaworthy on sailing on her intended voyage, all repairs or adjustments made necessary by subsequent events pertain to her management and cannot touch her seaworthiness. *The Steel Navigator*, 23 Fed. (2) 590 (C. C. A. 2); *The Newport*, 7 Fed. (2) 452 (C. C. A. 9); *The Pres. Polk* (D. C.), 40 Fed. (2) 65; *The Britani* (D. C.), 40 Fed. (2) 522. The unseaworthiness of the vessel when she left Bremen would therefore not affect the contractual obligations of the bill of lading. The appellee had performed its obligation and duty under the Harter Act and it was entitled to the protection of the Jason Clause" (Record, p. 714).

The Questions Presented.

4. *Where a shipowner fails to use due diligence to make his vessel seaworthy, and she is in fact unseaworthy at the time of sailing, can he nevertheless obtain exemption under Section 3 of the Harter Act, in respect of damage to cargo resulting from negligent navigation, provided he can satisfy the court that the unseaworthiness did not contribute to the damage?*

Section 3 of the Harter Act is conditional in form, and provides that

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy * * *"

the owner shall not be liable for damage resulting from faults or errors in the navigation or management of the vessel. In the case of *The Willdomino*, 300 Fed. Rep. 5, the Circuit Court of Appeals for the Third Circuit specifi-

cally decided that where a vessel owner furnishes an unseaworthy ship, through lack of due diligence—

> "he is liable for damage to the cargo resulting from negligence of the master and crew in the navigation or management of the vessel, and the carrier is so liable wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel" (p. 11).

This Court issued a writ of *certiorari* in that case, and the point above mentioned was briefed and argued in this Court. The case was affirmed on another ground, however, and this Court found it unnecessary to decide the precise point now under discussion (272 U. S. 718, 728).

The law in the Third Circuit, therefore, is definitely settled, that the condition stated in the 3rd section of the Harter Act is absolute; and that non-compliance with this condition deprives the owner of any protection under the section, without regard to any question of causal relation.

In the present case the Circuit Court of Appeals has definitely adopted the opposite view. In its opinion in the present case the Circuit Court of Appeals cites its opinion in the earlier case of *Hartford & New York Transportation Company* v. *Rogers & Hubbard Co.*, 47 Fed. (2) 189. In that case, at page 192, after reviewing the earlier authorities, the Circuit Court of Appeals for the Second Circuit said:

> "In view of the foregoing, the language of Judge Morris in *The Willdomino* (C. C. A.), 300 F. 5, at page 11, to the effect that a carrier is liable 'wholly without regard to whether or not there was any causal connection between the lack of due diligence

to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel' cannot be regarded as in accord with the authorities."

While this Court has never had occasion to decide the precise point presented here, it has several times expressed itself *obiter* in accordance with the rule in the Third Circuit. The most definite of these expressions appears in the opinion of this Court in the case of *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218, at page 226, where this Court said:

> "We repeat that *even if the loss occur through fault or error in management*, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word 'management' is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing." (Italics ours.)

The decision of the Circuit Court of Appeals for the Second Circuit in the present case is contrary to a number of its own previous decisions. We think it is no exaggeration to say that the decisions in that court, on the point here presented, are so conflicting that an authoritative decision by this Court is urgently required in the interest of justice.

The Circuit Court of Appeals for the Second Circuit has itself recognized the conflict in its various opinions on this point. Thus is *Comp. Gen. de Tabacos de Filipinas* v. *U. S.*, 49 Fed. (2) 700, Judge Learned Hand, delivering the opinion of that court, said (at pp. 701-2):

> "The facts do not raise a question argued at the bar; whether a ship's unseaworthiness in a respect

which has nothing to do with the loss, will deprive the owner of recourse to the section. The finality of our dictum to the contrary in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, 192, we need not therefore consider, except to observe that it is contrary to *In re O'Donnell* (C. C. A.), 26 F. (2d) 334; id., 34 F. (2d) 925 (C. C. A. 2), and to a dictum in *The Waalhaven*, 36 F. (2d) 706 (C. C. A. 2). Apparently this court has not finally committed itself, and it is not desirable to add any further *obiter* discussion. Here at any rate the unseaworthiness directly caused the loss, and that disposes of the case."

It may be that, in the present case, the court has finally committed itself; but an examination of the decisions in this Circuit suggests that decisions in future cases may depend on how the bench is constituted.

In our brief submitted herewith we shall discuss the various opinions and decisions in the Second Circuit on the question whether there must be a causal relation between lack of due diligence and subsequent damage in order to deprive a shipowner of the exemption granted in the third section of the Harter Act. In this petition we shall merely tabulate them chronologically as follows:

DECISIONS.

1913 Decision by Judge Holt in the Southern District of New York that there need be no causal relation (*The River Meander*, 209 Fed. 931, 937).

1921 Decision by Judge Mayer in the Southern District of New York that there need be no causal relation (*The St. Paul*, 277 Fed. 99, 107).

1922 Decision by Judge Ward in the Southern District of New York that there must be a causal relation (*The Turret Crown*, 282 Fed. 354, 360); reversed by C. C. A. without discussion of this doctrine.

1929 Decision by the Circuit Court of Appeals that there need be no causal relation (*In re O'Donnell*, 28 Fed. (2d) 833, 836).

1931 Decision by Circuit Court of Appeals that there need be no causal relation (*The K. Leonhan, Jr. John J. Ryan Corbette*, 48 Fed. (2d) 110, 112).

1933 Decision by Circuit Court of Appeals in present case, that there must be a causal relation.

OTHER DATA

1929 Opinion by Circuit Court of Appeals indicating that there must be a causal relation (*The Thessaloniki*, 207 Fed. 67, 70).

1929 Opinion by Circuit Court of Appeals indicating that there need be no causal relation (*The Manhattan*, 30 Fed. (2d) 709, 709).

1930 Opinion by Circuit Court of Appeals indicating that there need be no causal relation (*Louis Dreyfus v. Patterson Steamships, Ltd.*, 43 Fed. (2d) 824, 826).

1931 Opinion by Circuit Court of Appeals (cited as authority in present case) indicating that there must be a causal relation (*Hartford & N. Y. Transp. Co. v. Rogers & Hubbard Co.*, 47 Fed. (2d) 180, 182).

1931 Opinion by Circuit Court of Appeals indicating that the point was still open (*Comp. Gen. de Tabacos de Filipinas v. U. S.*, 49 Fed. (2d) 700, 702).

2. *Where a shipowner intervenes and personally orders a vessel to sail from an intermediate port knowing her to be unseaworthy, can he obtain exemption under the third section of the Harter Act by virtue of his previous compliance with that Act at the original port of shipment?*

The Circuit Court of Appeals held in this case that a lack of due diligence in preparing the vessel to sail from an intermediate port, even though this lack of diligence was on

the part of the owner itself, which intervened and took charge of the situation at Brenen, did not deprive the owner of the exemption provided by the Third Section of the Harter Act.

This decision is squarely contrary to the decision of the Circuit Court of Appeals for the Third Circuit in the case of *The Willdomino* (supra). In that case the owner intervened at an intermediate port (Gibraltar) and prevented the master from taking on an adequate supply of fuel. The Circuit Court of Appeals held that this was a fault chargeable to the owner personally. This Court, while not expressly deciding the point, apparently took the same view, as it referred to the "willful failure to take on sufficient coal" (272 U. S. 718, at p. 727). In its opinion in the present case the Circuit Court of Appeals for the Second Circuit says (Record, p. 714):

> "In the *Willdomino* case, the fault arose at the inception of the voyage."

This statement is clearly erroneous, as appears from an examination of the opinions of the Circuit Court of Appeals and of this Court. In that case cargo was taken on board at Messina, and the negligence in failing to take on a sufficient supply of fuel, occurred at the ports of Gibraltar and Lisbon. In that case, as in the present, the owner intervened and gave the instructions which rendered the vessel unseaworthy on sailing from an intermediate port. In that case, as in the present, the damage resulted not from the unseaworthiness, but from subsequent negligence in navigation.

The decision in the present case is contrary also to the rule as stated by the Circuit Court of Appeals for the Second Circuit in the case of *The Waatharen*, 36 Fed. (2nd) 706.

Reasons for Allowance of Writ.

1—The decisions in the Second Circuit on the two questions presented in the present case are hopelessly conflicting. The questions are of great commercial importance, and it is certainly desirable that the law on this subject should be definitely settled in this Circuit (in which the volume of maritime litigation is greater than in any other Circuit.

2—The law as laid down in the present case is directly contrary to the law as settled in the Third Circuit. Geographically, the port of New York is partly in the Second Circuit and partly in the Third Circuit. It is, we submit, intolerable that a different rule of law should be applied in two circuit courts of appeals, each of which has jurisdiction over a part of the waters of the same port.

3—The decision in the present case is contrary both to the letter and the spirit of the Third Section of the Harter Act. It nullifies the condition expressly stated at the beginning of that Section and places upon the owner of cargo the burden of litigating a question which is wholly irrelevant, namely, whether the shipowner's failure to comply with the condition has contributed to the subsequent loss or damage. In the present case your petitioner, Louis H. May, was forced to litigate this issue and was defeated, although his contention was certainly logical enough on its face, i. e., that the uncontrollable sheer of the "Isis", which caused the second stranding in the Weser River, was not unconnected with the fact that she had undertaken to navigate a narrow and winding channel at night with her steering gear disabled. Petitioner, of course, had no witnesses to any of the facts, and had to rely on the testimony of experts based on the fact evidence submitted by the respondent. This is precisely the situation which Congress foresaw and guarded against in phrasing the Third Section of the Harter Act. By that Section the shipowner receives

an exemption which is in derogation of the cargo owners' common law rights; but this exemption is expressly made conditional on the performance of certain duties. If the condition is not performed, the shipowner is in practically the same position as if the Harter Act had never been passed. The Third Section of the Harter Act is, in effect, an offer of immunity; and, like an offer, it must be accepted according to its terms. One who makes an offer is not bound by an acceptance which includes added or different conditions, even though the person who tenders the acceptance is prepared to prove that the new conditions are equally advantageous.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the case entitled on its docket, "Consolidated Action 10206, Louis H. May, Libellant Appellant, v. Hamburg Amerikanische Packetfahrt Aktien Gesellschaft, Respondent Appellee"; and that the said decree of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

LOUIS H. MAY,
INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,
ROYAL INDEMNITY COMPANY,
Petitioners.

By D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

This is a suit within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Article 3, Section 2 of the Constitution of the United States of America, and under Section 240 of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938 (U. S. C., Title 28, Sec. 347).

Statement.

The facts are sufficiently stated in the petition, and will not be repeated here.

Both of the courts below dealt with this case on the correct assumption that the petitioner's right to recover

the general average deposits exacted by the respondent, was dependent upon the same principles which would govern his right to recover damage to the cargo. In this case there was no damage to the cargo; but the requirement of the general average deposits was a clear breach of the contract of affreightment unless justified by facts which entitled the respondent to claim contribution.

Apart from the Harter Act, it is, of course, well settled that a shipowner cannot claim from cargo any contribution to sacrifices or expenses rendered necessary by negligence in navigation. *The Irrawaddy*, 171 U. S. 187; *The Jason*, 225 U. S. 32. Accordingly, the present case presents precisely the same issue which would be presented in a suit for damage to cargo, *i. e.*, whether or not the shipowner is entitled to the exemption granted by the third section of the Harter Act. If the respondent shipowner is entitled to this exemption, the present suit must fail; for the bills of lading incorporate a clause in substantially the form approved by this Court in the case of *The Jason* (*supra*), providing that if the shipowner has used due diligence to make the ship seaworthy, the cargo shall contribute in general average even where the sacrifice or expense is rendered necessary by negligent navigation. If, on the other hand, the respondent is not entitled to exemption under the Harter Act, it clearly had no right to contribution in respect of the second stranding, and the petitioner is entitled to recover.

The Circuit Court of Appeals did not discuss the question of due diligence as such, since its decision rendered that question immaterial. The court found, however, that the owner intervened and took charge of the situation at Bremen; and the evidence is clear that the respondent's marine superintendent and nautical director was fully aware of the conditions which the Circuit Court of Appeals found rendered the "Isis" unseaworthy when she sailed

from Bremen. Accordingly, the decision below can be sustained only on the theory that lack of due diligence and unseaworthiness are immaterial, under the third section of the Harter Act, unless they contribute to a subsequent loss.

Specifications of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

1. In holding that lack of due diligence and resulting unseaworthiness do not deprive a shipowner of the exemption granted in the third section of the Harter Act (Act of February 13, 1893; U. S. C., Title 46, Sec. 192) unless such unseaworthiness contributes to the damage in respect of which the exemption is sought.

2. In holding that a shipowner who personally intervenes and causes his ship to sail from an intermediate port in an unseaworthy condition, through lack of due diligence, is still entitled to exemption under the third section of the Harter Act provided he complied with that section at the original port of loading.

POINT I.

The ruling of the Circuit Court of Appeals that the owner of a ship which sails in an unseaworthy condition, through his failure to use due diligence to make her seaworthy, may nevertheless have the exemption granted in the third section of the Harter Act as to any damage not resulting from the unseaworthiness, is contrary to the language of the statute; is in conflict with a number of its own previous decisions; is squarely in conflict with the law as settled in the Third Circuit; and is contrary to the rule as several times stated by this Court.

(1) *The decision of the Circuit Court of Appeals in this case is contrary to the express terms of the Harter Act.*

The present case turns upon the proper construction of the third section of the Harter Act, which is as follows:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving

or attempting to save life or property at sea, or from any deviation in rendering such service."

It has frequently been held that the Harter Act, being in derogation of common law rights, should be strictly construed.

The Irrawaddy, 171 U. S. 187, 195;
Sacramento Nav. Co. v. *Salz*, 273 U. S. 326, 329;
The Germanic, 124 Fed. 1, 5. (C. C. A. 2 Circ.);
The Jeanie, 236 Fed. 463, 471 (C. C. A. 9 Circ.);
The Fort Morgan, 284 Fed. 1, 4 (C. C. A. 4 Circ.);
The Newport, 7 Fed. (2d) 452, 454 (C. C. A. 9 Circ.).

In construing the above section it is important to bear in mind that the Harter Act does not impose any liability. The first two sections of the Act are merely declaratory of the law as it stood before they were passed. They forbid carriers to insert in their bills of lading clauses relieving them of liability for their own negligence or the negligence of their servants. Such clauses were, of course, void at common law. *The Jason, supra.* The third section of the Act gives the carrier a conditional exemption from liability for losses due to certain specified causes. If a shipowner complies with the conditions laid down in this section, the section gives him certain protection which he already had at common law (*e. g.*, in respect of acts of God and public enemies—*cf. The Maggie Hammond*, 9 Wall. 435, at p. 444); it also gives him, *proprio vigore*, certain protection (*e. g.*, in respect of sea perils) which he could otherwise obtain by contract; and also gives him certain protection (*i. e.*, in respect of the negligence of his servants) which he could not legally obtain in any other way than by compliance with this section. A shipowner who does not comply with the condition is in exactly the same position as before the Act was passed. He can exempt himself, by the terms

of his bill of lading from liability for damage due to perils of the sea, latent defects and similar causes, but he cannot exempt himself from liability for damage due to negligence.

The argument is frequently made, on behalf of the shipowner, that Congress could not have intended to impose liability on a shipowner for something which did not cause any damage. The fallacy of this argument is readily apparent. The shipowner is not held liable because he failed to use due diligence, but because his servants have been guilty of negligent navigation. The owner's lack of due diligence merely precludes him from obtaining a statutory exemption and leaves him subject to his ordinary common law liability.

The very structure of the third section of the Harter Act clearly indicates that there is no causal connection contemplated between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made the condition of exemption in respect of negligent navigation. If the Act were based on causal relation, one would expect that a shipowner who had used due diligence to make his ship seaworthy would be relieved from liability for losses resulting from unseaworthiness. The Act does not say this, however, and is not so construed. In *The Carib Prince*, 170 U. S. 655, at pages 661-2, this Court held that the Harter Act does not protect the shipowner in respect of damage due to unseaworthiness, even though he has used due diligence to make his vessel seaworthy.

In holding that the respondent was entitled to exemption under the third section of the Harter Act, the Circuit Court of Appeals said (Record, p. 712):

> "We have held that, while the Harter Act requires an owner to provide a ship that is in all respects seaworthy before he can take advantage of

the exemptions under the Act, this requirement affects only causes of action for damages resulting from unseaworthiness. *Hartford & N. Y. Transp. Co.* v. *Rogers & Hubbard Co.* (C. C. A.), 47 F. (2d) 189, 192. There we said:

> 'It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness.'

See *The Malcolm Baxter, Jr.*, 277 U. S. 323, 48 S. Ct. 516, 72 L. Ed. 901; *The Thessaloniki*, 267 F. 67 (C. C. A. 2); *Boston Marine Ins. Co.* v. *Met. Redwood Lumber Co.*, 197 F. 703 (C. C. A. 9); *The Turret Crown* (D. C.), 282 F. 354."

The case of *The Malcolm Baxter, Jr.*, cited in the above quotation, lends no support whatever to the proposition for which it is cited. In that case this Court held that the owners' failure to exercise due diligence to make the vessel seaworthy deprived them of any right to exemption under the Harter Act (277 U. S. 323, at p. 331). Apparently the case was cited because of the following statement in the opinion of this Court (at p. 331):

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness."

This statement, however, clearly has no bearing on the present case. It was made in connection with a bill of lading clause exempting the vessel from liability for "restraints of princes, rulers and peoples". This clause, of course, was perfectly valid at common law, and the shipowners, in claiming the benefit of it, did not require any aid from the Harter Act. If it had been necessary for the shipowners to rely on the Harter Act, they would

have failed; for this Court expressly held that they were not entitled to exoneration under that Act. Based on a careful reading of the opinion, and on our knowledge of the case, in which we were of counsel, we feel justified in stating that the decision of this Court in the *Malcolm Baxter, Jr.,* does not lend the slightest support to the decision in the present case; and so far as it has any bearing on the present case it tends to support the position of your petitioner.

The case of *Boston Marine Insurance Company* v. *Met. Redwood Lumber Co.,* which is also cited by the Circuit Court of Appeals in support of its decision, did not deal with the Harter Act at all, but only involved the Act of March 3rd, 1851, granting shipowners a limitation of liability (R. S. 4283; U. S. C., Title 46, Sec. 183). We respectfully submit that decisions dealing with the Act of 1851 have no possible bearing on the question which arises here under the third section of the Harter Act. It is, of course, well settled that the "privity or knowledge" which will prevent an owner from obtaining limitation under the Act of 1851, is privity or knowledge of something which results in loss or damage. This results necessarily from the express language of the Act of 1851, which grants to a shipowner a limitation of his liability for any "loss, damage * * * or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner * * *."

The other cases cited by the Circuit Court of Appeals in the passage above quoted from its opinion, are all cases decided in the Second Circuit. We shall mention these in discussing the present state of the law in that Circuit.

(2). *The decision of the Circuit Court of Appeals in this case is contrary to a number of its own previous decisions and dicta.*

In support of the above statement we will submit a brief chronological analysis of the cases in which the question now under discussion has been considered either by District Courts in the Second Circuit or by the Circuit Court of Appeals for the Second Circuit.

As far as we can ascertain, the first decision on the point now under discussion was rendered in the case of *The River Meander,* 209 Fed. 931 (S. D. N. Y.; Opinion by Judge Holt, December 23, 1913). There Judge Holt held, as a necessary part of his decision (at p. 937):

> "Moreover, on the voyage to New York the serious and substantially constant leak in the No. 1 port hold, which began shortly after leaving Gibraltar, shows, in my opinion, that the ship was not seaworthy during the voyage. It is said that that leak had nothing to do with the damage to the cargo, which I think is true; but the requirement of the Harter Act is that the owner must provide a ship that is in all respects seaworthy before he can take advantage of the exemptions from liability required by that act."

In *The Thessaloniki,* 267 Fed. 67 (C. C. A. 2nd Circ., Circuit Judges Ward, Rogers and Hough; Opinion by Judge Ward, August 11, 1920), it was claimed on behalf of cargo that the ship was unseaworthy in respect of her boilers and engines. There was also some suggestion that the abandonment of the vessel was premature and that if her crew had remained on board, she might have been saved. The Court said:

> "We think it quite incredible that a valuable steamer and cargo would have been abandoned within 300 miles of New York, if they were not past saving. However, had this been the case, it would have been an error in the navigation and management of the

> vessel, for which the owners would not be liable under the Harter Act (Comp. St. §§8029-8035); if they had exercised due diligence to make her seaworthy.
>
> The only charges of unseaworthiness in the pleadings and in the proofs are connected with the boilers, engines, and sounding pipes. We may assume them all to be established, and the only result would be delay in the prosecution of the voyage" (p. 70).

It is not entirely clear from the opinion whether the passage above quoted constitutes a necessary part of the decision or whether it should be classed as *obiter dictum.*

In *The St. Paul,* 277 Fed. 99 (S. D. N. Y., Opinion by Judge Mayer, January 10, 1921), the vessel was seized under legal process. The carrier sought exemption, under Section 3 of the Harter Act, from liability for damage to cargo resulting from fire during the delay while the vessel remained in custody. Judge Mayer held (at p. 107), that the carriers' failure to exercise due diligence to make the vessel seaworthy precluded him from claiming exoneration under the Harter Act, apparently without regard to any causal connection between the unseaworthiness and the damage to cargo.

In *The Turret Crown,* 282 Fed. 354 (S. D. N. Y.; Opinion by Circuit Judge Ward, May 12, 1922), the District Court found that the vessel was unseaworthy when she sailed on her voyage, but that the unseaworthiness had no causal connection with the damage to cargo sued for. Upon these facts, Judge Ward held (p. 360):

> "If forcing the steamer into the sea, whether a head sea or following sea, at a speed sufficient to give steerage way did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act (Comp. St. §§8029-8035)."

Accordingly, the libel was dismissed in the District Court. The Circuit Court of Appeals reversed this decision on the ground that the damage to cargo resulted directly from the unseaworthiness of the vessel. Accordingly, the question now under discussion was not considered or decided in that court (297 Fed. Rep. 766).

In re O'Donnell et al., 26 Fed. (2d) 334 (C. C. A. 2nd Circ.; Circuit Judges Manton, Learned Hand, and Swan; Opinion by Ct. Judge Learned Hand, May 14, 1928), two barges in tow of a tug sank and damaged their cargoes as a result of the tug's negligent navigation. Suit was filed by the owners of the cargoes of both barges, and the owner of the tug filed a petition for limitation of liability. The court ruled that the tug and barges must be considered together as a unit within the principle of *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326; and, if the condition of the statute was satisfied, that the owner of the tug was entitled to exemption from liability for damage to the cargo on the barges resulting from the negligent operation of the tug, under the provisions of Section 3 of the Harter Act. However, the court definitely ruled as part of its decision (p. 336):

> "However, it is plain that both vessels must fulfill the conditions of the exemption. In the case at bar the tug proved that she was seaworthy at the outset of the voyage * * *. The same is not true as to the seaworthiness of the barges, as to which no proof whatever was attempted. The record as it stands is defective in this respect, and that proof must be supplied."

The seaworthiness or unseaworthiness of the two inert barges could have no possible connection with the damage resulting from the tug's negligent towage, and yet the decision of the court is clear and unambiguous that the

protection of Section 3 of the Harter Act would not be afforded to the carrier without proof of the seaworthiness of the barges. The court held (at p. 337):

> "This appeal is a new trial, and we can take proof in this court of the seaworthiness of the barges. Unless the appellants choose to concede the issue, the appellees must make proof before William Parkin, Esq., as commissioner, on whose report the case may be again brought on for final determination. If he finds the barges seaworthy, and his report is confirmed, the decree will be affirmed; otherwise, it will be reversed. The appellees must in any event bear the costs of this reference, but, if the decree is affirmed, the appellants will bear the general costs of the appeal."

In *The Waalhaven*, 36 Fed. (2d) 706 (C. C. A. 2nd Circ.; Circuit Judges Learned Hand, Swan and Chase; opinion by Ct. Judge Learned Hand, December 9, 1929), it was found that the vessel sailed on her voyage in an unseaworthy condition, but the subsequent disaster in which she was involved had no causal connection with the unseaworthiness. Insufficiency of the bunkers made her unseaworthy; she was damaged while being forced through fields of ice. In the course of the opinion it was said (p. 709):

> "We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A., §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, * * *."

It will be noted that Judge Learned Hand did not state which way the question we are now considering was well settled, but his subsequent reference to this case in *Comp. Gen. Tabacos de Filipinas* v. *U. S.*, 49 Fed. (2d) 700, at page 702 (quoted *supra*, in the Petition at pp. 8, 9), clearly discloses that what he meant was that it was well settled

that unseaworthiness through lack of due diligence defeated the carrier's right to the exemptions of Section 3, whether the unseaworthiness had any relation to the disaster or not. Of course the discussion in *The Waalhaven,* which we have quoted, is *obiter dictum;* the vessel owner was held liable for deviation.

In *Louis-Dreyfus* v. *Paterson Steamships, Ltd.*, 43 Fed. (2d) 824 (C. C. A. 2nd Circ.; Circuit Judges Learned Hand, Chase and Mack; opinion by Ct. Judge Learned Hand, July 21, 1930), grain was shipped at Duluth on two large steamers owned by the respondent for through carriage to Montreal, with transshipment at Port Colborne. Part of the grain was transshipped at Port Colborne on the "Advance" which stranded during the course of her subsequent voyage as a result of negligence in navigation, and her cargo was badly damaged. The carrier relied upon the exemptions of both Section 3 of the Harter Act and Section 6 of the Canadian Water Carriage of Goods Act. While the "Advance" was not a vessel "transporting merchandise or property to or from any port in the United States of America" (Harter Act, Section 3), the argument advanced was that as the contract of carriage was for through transportation from Duluth to Montreal, the carrier was entitled to the protection of Section 3 of the Harter Act. The Court said (p. 826):

> "We shall assume *arguendo* that Section 3 of the Harter Act did not cover the case; verbally it only includes 'vessels transporting merchandise or property to or from any port in the United States.' The point is not raised in any event, since there is no proof of the seaworthiness of the vessels clearing from Duluth, which lifted the wheat. If the 'Advance' is to be identified with these, the substitution being ignored, at least all three ships concerned must be shown to be seaworthy."

Of course, any unseaworthiness of the first two vessels could have no possible connection with the negligent navi-

gation of the on-carrying vessel. As the Court found that the carrier was entitled to exemption from liability under Section 6 of the Canadian Water Carriage of Goods Act, the language we have quoted may be considered *obiter dictum.*

In *Hartford & N. Y. Transp. Co. v. Rogers & Hubbard Co.*, 47 Fed. (2d) 189 (C. C. A. 2nd Circ.; Circuit Judges Manton, Augustus N. Hand, and Chase; opinion by Ct. Judge Augustus N. Hand, Jan. 5, 1931), the court found that the vessel involved was in all respects seaworthy and that the damage to cargo involved in the suit resulted from negligence in navigation. The court, however, delivered the following *dictum* (at p. 192), which it cites as authority for its decision in the present case.

> "While it is contended that the Harter Act (46 U. S. C. A., §§190-195) requires the owner to provide a ship that is in all respects seaworthy before he can take advantage of the exemptions under that act, this requirement affects only causes of action for damages *resulting* from unseaworthiness. It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 48 S. Ct. 516, 72 L. Ed. 901; *The Turret Crown* (C. C. A.), 284 Fed. 439; *The Turret Crown* (D. C.), 282 F. 354; *The Thessaloniki* (C. C. A.), 267 F. 67. In view of the foregoing, the language of Judge Morris in *The Willdomino* (C. C. A.), 300 F. 5, at page 11, to the effect that a carrier is liable 'wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel' cannot be regarded as in accord with the authorities."

In *The R. Lenahan, Jr.-John J. Ryan-Carlotta,* 48 Fed. (2d) 110 (C. C. A., 2nd Circ.; Circuit Judges Learned Hand, Chase and Mack; opinion by Ct. Judge Learned Hand, March 9, 1931), the court cited its prior decision *In re O'Donnell,* 26 Fed. (2d) 334, and again held that, where a tug and tow together engaged in the carriage of cargo, if the owner would secure exemption from liability for damage to cargo on the barge resulting from negligence in the navigation of the tug, under the principle of *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, there must be proof that

> "* * * the flotilla was seaworthy and well manned, an issue on which the claimant has the burden" (p. 112).

In *Comp. Gen. de Tabacas de Filipinas* v. *U. S.,* 49 Fed. (2d) 700 (C. C. A., 2nd Circ.; Circuit Judges Learned Hand, Swan and Chase; opinion by Ct. Judge Learned Hand, May 4, 1931), the court pointed out the conflict in its various decisions and *dicta* on this point and said:

> "Apparently this court has not finally committed itself, and it is not desirable to add any further *obiter* discussion" (p. 702).

We have quoted from the opinion in the above case in the the petition (*supra,* pp. 8, 9).

In the light of this analysis of the decisions and dicta in the Second Circuit, we submit that it is very doubtful whether the decision in the present case can be accepted as settling the law of this Circuit. Even if it be assumed that the decision in the present case will be final, we submit that it is erroneous and should be reviewed by this Court.

(3) *The decision of the Circuit Court of Appeals in this case is directly contrary to the settled law of the Third Circuit.*—

We think there can be no dispute as to the clear conflict between the Second and Third Circuits on this point. As stated in the petition (*supra*, pp. 6, 7), the rule of the Third Circuit was very clearly stated in *The Willdomino*. This rule was expressly rejected by the Circuit Court of Appeals for the Second Circuit in *Hartford & New York Transportation Co.* v. *Rogers & Hubbard Co.* (*supra*, p. 28); and the ruling in that case is cited as authority for the decision of the Circuit Court of Appeals in the present case. Accordingly, there is a clear conflict between the decisions in the two Circuits, which can only be settled by this Court.

(4) *The decision of the Circuit Court of Appeals in the present case is contrary to the rule as several times stated by this Court.*

We have quoted in the petition (*supra*, p. 8), the language of this Court in *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, at page 226. We agree that this language was not necessary to the decision; but we submit that it is clear and unmistakable.

In *The Wildcroft*, 201 U. S. 378, this Court again considered Section 3 of the Harter Act and said (at pp. 388-9):

> "The relief afforded by the third section of the Harter Act to the owner of a vessel, transporting property, is purely statutory. In the case at bar there could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act.
>
> To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does

> so *upon the distinct condition* that the owner shall show that the vessel was *in all respects* seaworthy and properly manned, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. * * * It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end that the law relieves him of the liability which he would otherwise incur." (Italics ours.)

In this case also the language above quoted was not necessary to the decision, as this Court affirmed the decision of the court below, that the vessel was in fact seaworthy.

See also *The Southwark*, 191 U. S. 1, at page 16.

POINT II.

Where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call and through failure to use due diligence causes her to sail in an unseaworthy condition, he can obtain no exemption under Section 3 of the Harter Act.

The Circuit Court of Appeals found that the "Isis" was unseaworthy when she sailed from Bremen; that the owner had intervened at Bremen through its marine superintendent; and that the decision to sail the vessel at night in her crippled condition was made by the owner's marine superintendent and not by the master. It appears that the marine superintendent was in touch with the Home Office

of the company, which was in Hamburg, not far away; that he was fully informed of all that was done at Bremen and assumed full responsibility. No certificate of seaworthiness was obtained from an independent surveyor; the drydock was not entirely pumped out and the only examination of the rudder was made at night, while it was partly submerged, and without the aid of a diver. It is entirely clear from the evidence that the master himself would not have assumed the responsibility of sailing the vessel in her crippled condition. Nevertheless, the Circuit Court of Appeals decided, as we read the opinion, that the owner is entitled to the protection of the Third Section of the Harter Act, because that section was complied with before the "Isis" sailed from the Pacific Coast. The rule laid down by the Circuit Court of Appeals appears to be that if a shipowner fulfills the condition of Section 3 of the Harter Act at the port of shipment, nothing that he does afterward will deprive him of the exemption provided in that section. He may take charge of the vessel at a subsequent port of call and render her wholly unseaworthy; but he is still entitled to the protection of the Harter Act as to any cargo damage which does not result from the unseaworthiness.

We know of no authority in support of this decision, and it is not sustained by any of the decisions cited by the Circuit Court of Appeals in its opinion. All of these were cases where the fault or negligence at the intermediate port was that of the master or officers of the ship, without the knowledge of the owners and without any intervention on their part. This was specifically pointed out in the case of *The Guadeloupe*, 92 Fed. Rep. 670, where Judge Brown said (at p. 671):

> "It was doubtless the duty of the master to use diligence in making all necessary repairs at Santos to put the ship in a seaworthy condition, and for that purpose to make such surveys as were appar-

> ently needed in order to determine what repairs were necessary. * * * If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the 'management' of the ship; since the question arose after the voyage had commenced, at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination."

The decision in the present case is not only unsupported by authority, but is contrary to all the authority we have been able to find on the subject.

In *The Willdomino*, 300 Fed. 5 (C. C. A. 3rd Circ.; affirmed 272 U. S. 718), the vessel loaded the libellant's cargo at Messina, Italy, for transportation to New York. After leaving Messina, she put in at Gibraltar for bunkers, and subsequently also bunkered at Lisbon and Ponta Delgada. The amount of coal taken on by the vessel was found to have been insufficient and it was held that this rendered her unseaworthy when she sailed from these coaling ports for New York. The owners were held liable for damage to cargo resulting from a subsequent stranding of the vessel due to negligent navigation. The failure of the vessel to take on a sufficient quantity of coal was due to instructions contained in a cablegram sent by the vessel owners to the master while the vessel was in the port of Gibraltar.

At page 15 of the opinion, the Circuit Court of Appeals for the Third Circuit said:

> "The acts of the vessel in leaving Gibraltar, Lisbon, and Ponta Delgada with an inadequate supply of fuel is attributable as a matter of law to the owners of the vessel. *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *British & Marine Ins. Co.* v. *Kilgour S. S. Co.*

(D. C.), 184 Fed. 174, 177. It is likewise so attributable in fact. While the 'Willdomino' lay at Gibraltar, the master received from the claimant the following cablegram:

> 'Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler.'

> As the vessel was not seaworthy when she sailed from Lisbon or Ponta Delgada, and as the claimant did not exercise due diligence to make her seaworthy before leaving those ports, the conditional exemption provided by section 3 of the Harter Act cannot be availed of if the damage to the cargo occurred through the fault or error in navigation."

In affirming the decision of the Circuit Court of Appeals, this Court referred to the "willful failure to take on sufficient coal", and the opinion shows clearly that the owner was held personally responsible for this default.

In the opinion in the present case the Circuit Court of Appeals said, in considering the point now under discussion (Rec., p. 714):

> "In *The Willdomino* case, the fault arose at the inception of the voyage."

We submit that the court was clearly in error in making this statement. In *The Willdomino* the cargo involved in the suit was shipped at Messina, Italy, and the fault of which the Circuit Court of Appeals for the Third Circuit spoke, was in connection with bunkering at the way ports of Gibraltar, Lisbon and Ponta Delgada.

In *The Waalhaven*, 36 Fed. (2d) 706 (C. C. A. 2nd Circ.), cargo was laden on the vessel at Nordenham, Ger-

many, for transportation to Wilmington, N. C., and Jacksonville, Fla. She ran out of bunkers during the course of her trans-Atlantic voyage and put in at St. Johns, N. F., as a port of refuge, to rebunker. The master had planned to take on sufficient bunkers there to complete his voyage, but he received direct cable instructions from his owners to take only sufficient bunkers to reach Louisburg, Nova Scotia, where he should rebunker for the remainder of the voyage. In following the course ordered by the owners, the vessel sustained damage by ice and her cargo was seriously damaged. The greater part of the opinion has relation to the doctrine of deviation. However, the vessel owner urged that the master's action, in sailing from St. Johns with insufficient bunkers for the remainder of the voyage, was a mistake in management within the protection of Section 3 of the Harter Act. In dealing with this contention, the court said (p. 709):

> "Obviously this was not due to a mistake of management; *it was because of the owner's command.* We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A. §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, but we need only decide that, whatever the master would have done, had he been left to himself, *he was not free; as he testified, he had to follow his orders.*" (Italics ours.)

In the present case we stressed *The Waalhaven* decision in our argument and brief in the Circuit Court of Appeals, but that decision is not mentioned in the opinion of the court.

In *The Valentine*, 131 Fed. 352 (E. D. N. Y.), a steam lighter was caught in an ice jam and sank as a result of the negligence of her master in not keeping any watch.

The lighter was employed in transportation in New York harbor and her owners were fully aware of the fact that after the vessel tied up at destination, no watch would be kept. In the course of the opinion the court said (p. 353):

> "But if the owners of the ship know that on the voyage, or *at ports intermediate or otherwise*, or on the seas, the fires will be banked, the water for steam allowed to get cold, and that the captain and engineer will go ashore, and the rest of the crew will go to sleep, and that there is no method of being forewarned of leaks, and that all equipment for avoiding injury therefrom will be rendered useless; and if the owners approve, suffer, or connive at such custom or practice, such vessel is not properly manned, nor do the owners intend that the initial equipment and crew shall perform the duties for which they are provided. *If the Harter Act was expected to absolve owners under such conditions, it goes beyond its present understood purpose, and allows them to make provision for negligent acts and omissions, and for undoing on the voyage what they have done before the voyage began.*" (Italics ours.)

We submit that the principle stated or applied in *The Willdomino* (*supra*), *The Waalhaven* (*supra*), and *The Valentine* (*supra*), is sound and in accordance with the purpose of the Harter Act. If a shipowner intervenes at an intermediate port, we submit that he is subject to precisely the same responsibility, so far as the Harter Act is concerned, which rests upon him at the original port of lading. This principle applies with especial force in a case like the present, where the events at the intermediate port resulted in starting what amounted to an entirely new venture. Setting out from Bremen in tow and with the rudder lashed, can scarcely be regarded as a mere continuation of the original voyage.

If the master had personally taken the responsibility for what was done at Bremen, and the owners had been far distant and had taken no part in the decision, it may well be that the owners would still be entitled to the protection of the Harter Act.*. It is perfectly clear, however, that if the owners had not intervened, the master would not have taken any such responsibility. It was the owners who decided not to have the ship repaired at Bremen; and ordered the expedient of having the vessel towed to Hamburg.

Intervention by the owners was not through some minor representative. Captain Reichenbacher was the respondent's nautical director and marine superintendent (Rec., fols. 357, 599). His office was in the respondent's main office at Hamburg (fol. 629). He was sent from Hamburg to Bremen to take charge of the "Isis" by the respondent's Board of Directors, who gave him power to act for the respondent (fols. 629-30).

He testified that he made the decision that the rudder should be lashed and the vessel towed to Hamburg (fol. 630); that he was fully aware that the Bremen shipyards could have repaired the "Isis" (fol. 632); and that he made the decision for the repairs at Hamburg rather than at Bremen for the respondent's benefit (fols. 633, 950). He saw the vessel in drydock and was one of those who made such examination of the rudder blade as was made (fols. 605, 943-4). He knew that the drydock was not completely pumped out to permit visual examination of the bottom part of the rudder. He was there and knew that the examination being made of the rudder was made during darkness (fols. 943-4); and that the only test being made for straightness was to put a "small piece of wood" against it (fols. 943-5, 954-6). He was there when the rudder was made fast amidships and saw the work done (fols. 607-9). He had a conversation with the classification surveyor about a certificate of seaworthiness (fols.

612-4), and knew that the "Isis" was sailing without an examination by the classification surveyor and without a certificate of seaworthiness (fols. 639-44). He formed the opinion that it was better for the ship to sail in the daytime and knew that the ship was sailing at night (fol. 615). He had the same opinion at the time he testified (fols. 644-5). He knew that the channel of the Weser River, on which Bremen is situated, is narrow and winding, as is the channel of the River Elbe, up which the "Isis" would have to navigate to reach Hamburg, and that navigation on the two rivers is hazardous at best (fols. 636-7).

The testimony establishes clearly that the respondent took control of the situation from the master and ordered the procedure to be followed. The master looked to Reichenbacher for guidance. He referred to Reichenbacher in his testimony as his boss (fol. 499), and he testified that Captain Reichenbacher ordered the pilot and the tugs for a night sailing (fol. 504).

It further appears that the course decided upon by Captain Reichenbacher was known to and approved by the Home Office of the respondent in Hamburg. We quote as follows from the testimony of the respondent's witness, Brandt (fols. 552-3):

> "Q. Is it not a fact that the decision to proceed to Hamburg from Bremen without repairs being made at Bremen was made by the head office in Hamburg and not by the Captain? A. Yes, by the head office, not by the Captain."

If any further confirmation is needed on this point, it can be found in the testimony of respondent's witnesses, Mr. Warns (fols. 928-9), and Mr. Dahlstrom (fols. 570-1). The testimony of these witnesses makes it clear that Captain Reichenbacher reported directly to his superiors in Hamburg.

It is clear that the Home Office of the respondent knew and approved of the plan to tow the "Isis" to Hamburg without making repairs; and that this course could not have been followed without their approval.

We submit that the decision in the case now on appeal, on this issue, is directly in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *The Willdomino* (*supra*); and is also directly in conflict with the views expressed by the Circuit Court of Appeals for the Second Circuit in *The Waalhaven* (*supra*).

CONCLUSION.

We respectfully submit that a writ of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit, because of the importance of the questions presented; because the decision in the present case is directly contrary to the settled law of the Third Circuit; and because of the long series of conflicting decisions by the Circuit Court of Appeals for the Second Circuit.

Dated, May 18, 1933.

Respectfully submitted,

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